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Making Up for Lost Time: The Third Circuit's Use of Remedies for Violations of the Individuals with Disabilities Education Act

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Issues in the Third Circuit

MAKING UP FOR LOST TIME: THE THIRD CIRCUIT'S USE OF REMEDIES FOR VIOLATIONS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

I. INTRODUCTION

The United States of America has a sad history of neglecting children with mental and physical disabilities.[1] Through the efforts of advocates, children with disabilities first obtained access to schooling in some states in the early nineteenth century.[2] Congress, however, did not directly address the issue of education for children with disabilities until 1975, when it passed the Education for All Handicapped Children Act ("EAHCA").[3] Special education law is still based on the EAHCA, which Congress renamed the Individuals with Disabilities Education Act[4] ("IDEA") in 1990.[5]

The IDEA provides federal funds to states that comply with its requirements regarding education of children with disabilities.[6] The concept at the foundation of the Act is that all children with disabilities are

1. See KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 397-98 (4th ed. 1998) (dating earliest known school for children with disabilities in America as 1817); Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. REV. 35, 35 (1996) (stating that in 1975, of eight million American children with disabilities, nearly one-half million were not receiving appropriate education and at least an additional million were excluded from school).

2. *See* ALEXANDER & ALEXANDER, *supra* note 1, at 397 (listing schools that were opened in Connecticut, New York, Pennsylvania and Massachusetts during the 1800s).

3. Pub. L. No. 94-142, 89 Stat. 773 (providing federal funds to states for improved educational services for children with disabilities); ALEXANDER & ALEXANDER, *supra* note 1, at 396 (noting that EAHCA was first congressional act to protect children with disabilities).

4. 20 U.S.C. §§ 1400-1487 (2000).

5. *See* ALEXANDER & ALEXANDER, *supra* note 1, at 396 (noting that IDEA governs law today). This Casebrief uses EAHCA and IDEA interchangeably.

6. *See* 20 U.S.C. § 1412(a) (2000) (limiting eligibility for assistance to those states which demonstrate to Secretary of Education that their educational programs meet conditions of Act). Congress used its spending clause powers to enact the IDEA. *See id.* Therefore, the statute will not be affected by the Supreme Court's recent ruling that the Americans with Disabilities Act ("ADA") is unconstitutional as applied to states. *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, No. 99-1240, 2001 U.S. LEXIS 1700, at *32 (U.S. Feb. 21, 2001) (holding that ADA, which is based on Congress' Fourteenth Amendment powers, cannot be applied to states).

entitled to a free appropriate public education.[7] The Act contains an elaborate procedural provision with a framework for how the state should perform its duty and how parents and children can assert their rights.[8]

The IDEA does not provide a catalog of appropriate remedies; rather, it calls on the judiciary to grant such relief as the particular court determines appropriate.[9] When a child has missed months or even years of appropriate public education, what can a court possibly do to make the child whole? The United States Supreme Court has specifically endorsed the remedy of tuition reimbursement for parents' payments to a private school.[10] Most circuits have read the statute, in combination with the Supreme Court's interpretation, as allowing compensatory education—pub-

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7. *See* 20 U.S.C. § 1401(3) (2000) (defining "[c]hild with a disability"). The Act's definition is as follows:

> a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.

Id. The Act further provides a separate definition for children between the ages of three and nine:

> The term "child with a disability" for a child aged 3 through 9 may, at the discretion of the State and the local educational agency, include a child experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and who, by reason thereof, needs special education and related services.

Id.

The Act further provides that each child is entitled to a free public education. *See* 20 U.S.C. § 1412(a)(1) (stating that availability of free appropriate education for all children from ages three to twenty-one (with some exceptions) is one condition before state is eligible to receive funds under IDEA). The Act defines free appropriate education as:

> special education and related services that–
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> (A) have been provided at public expense, under public supervision and direction, and without charge;
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> (B) meet the standards of the State educational agency;
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> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
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> (D) are provided in conformity with the individualized education program required under section 614(d) [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(8) (2000).

8. *See* 20 U.S.C. § 1415(i)(2)(B)(iii) (2000) (delineating administrative procedures under Act).

9. *See* 20 U.S.C. § 1415(i) (2000) (discussing, generally, finality of decisions at initial hearing and on appeal).

10. *See* Sch. Dist. of Burlington Township v. Dep't of Educ., 471 U.S. 359, 374 (1985) (holding that "such relief as the court determines is appropriate" includes tuition reimbursement).

lic education beyond the state's normal obligation.[11] A few circuits have gone even further by allowing plaintiffs to recover monetary damages under 42 U.S.C. § 1983.[12] The United States Court of Appeals for the Third Circuit allows all three remedies, making it a leader in guaranteeing fair treatment of children with disabilities.[13]

This Casebrief focuses on the remedies available for denial of an appropriate education to children with disabilities. Part II discusses in detail the history and present state of special education in the United States, including the IDEA, its text, legislative history and application in case law.[14] Part III details important case law in the Third Circuit regarding remedies for violations of the IDEA.[15] Finally, Part IV provides recommendations to education advocates fighting for the rights of children with disabilities in the Third Circuit.[16]

II. BACKGROUND

A. *Ground-breaking Cases:* Pennsylvania Ass'n of Retarded Citizens v. Pennsylvania *and* Mills v. Board of Education

The United States Supreme Court gave education advocates great hope when it took a strong stance on the importance of education in the landmark civil rights case *Brown v. Board of Education.*[17] It would be nearly twenty years after *Brown,* however, before a federal court acted to increase the access of children with disabilities to public education.[18]

In the 1971 decision in *Pennsylvania Ass'n for Retarded Children ("PARC") v. Commonwealth,*[19] a three judge panel in the United States District Court for the Eastern District of Pennsylvania ruled that children with mental disabilities in Pennsylvania were entitled to a free public educa-

11. *See* Streett, *supra* note 1, at 51 (stating that allowing compensatory education is majority view); Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases,* 67 EDUC. L. REP. 881, 882-83 (1991) (noting shift towards allowing compensatory education in 1980s).

12. *See* 42 U.S.C. § 1983 (2000) (providing "civil action for deprivation of rights"); Streett, *supra* note 1, at 52 (noting that minority of courts have granted monetary damages for IDEA violations).

13. *See* Ridgewood Bd. of Educ. v. M.E., 172 F.3d 238, 248-53 (3d Cir. 1999) (discussing tuition reimbursement, compensatory education and monetary damages).

14. For a further discussion of special education in the United States, see *infra* notes 17-113.

15. For a further discussion of Third Circuit law regarding remedies for IDEA violations, see *infra* notes 114-56.

16. For practitioners notes, see *infra* notes 157-71.

17. 347 U.S. 483 (1954); *see also* ALEXANDER & ALEXANDER, *supra* note 1, at 398 (discussing precedent set by court-ordered desegregation of public schools and its effect to strengthen case for all children's right to public education).

18. *See* ALEXANDER & ALEXANDER, *supra* note 1, at 398 (noting that although Supreme Court decided *Brown* in 1954, first case to grant children with disabilities right to free public education was not decided until 1971).

19. 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).

tion.[20] The decision also provided that the state must not only educate children with mental disabilities along with their peers without disabilities as much as feasible, but also make periodic evaluations of such children.[21] To ensure a state fulfills its obligation to all children, the court guaranteed children procedures to challenge their school's actions.[22]

Just one year after the *PARC* decision, the United States District Court of the District of Columbia expanded upon the Third Circuit's guarantees with its holding in *Mills v. Board of Education of District of Columbia*.[23] The decision reached children with mental disabilities, as well as those who are "emotionally disturbed, blind, deaf, and speech or learning disabled."[24] Guarantees made by the court—a free education designed for each child's needs and due process procedures, including notice and an opportunity to be heard—became the foundation of the upcoming federal legislation.[25]

B. *The Individuals with Disabilities Education Act*

Scholars credit the *PARC* and *Mills* decisions with awakening public awareness and sparking congressional action concerning the problems facing children with disabilities.[26] In 1973, Congress passed the Rehabilitation Act[27] to prevent discrimination against persons with disabilities in

20. *See id.* at 1258 (reporting consent agreement between parties that enjoined state from taking any action "to postpone or in any way to deny to any mentally retarded child access to a free public program of education and training").

21. *See id.* at 1260 (expressing presumption that inclusion in regular public school class is preferable to participation in special education class, which is preferable to individual education).

22. *See id.* at 1261 (mandating re-evaluation at least every two years and providing parents with notice and right to request hearing upon each evaluation).

23. 348 F. Supp. 866 (D.D.C. 1972). The seven children, who had been excluded from public schools in the District of Columbia, brought suit in *Mills*. *See id.* at 868 (noting that plaintiffs, who had behavioral, emotional or mental problems, had either never been admitted to public school or expelled after admission). The court declared that the state had an obligation, arising out of the Constitution of the United States and the District of Columbia Code, to educate all children. *See id.* at 876.

24. *Id.* at 868.

25. *See id.* at 872 (instructing school districts about children's rights); ALEXANDER & ALEXANDER, *supra* note 1, at 398 (describing *Mills* as laying groundwork for federal legislation).

26. *See* ALEXANDER & ALEXANDER, *supra* note 1, at 402 (asserting that cases were largely responsible for public outcry and congressional action in 1973); THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 2 (1993) (noting that *PARC* and *Mills* had "their national application four years later in IDEA"); MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 60 (1998) (observing that procedural provisions from *PARC* and *Mills* became framework for IDEA procedural safeguards); *see also* H.R. REP. NO. 99-296, at 3 (1986) (beginning history of IDEA with mention of *PARC* and *Mills*).

27. Pub. L. No. 93-112, 87 Stat. 355, § 504 (codified as amended at 29 U.S.C. § 794 (2000)) [hereinafter Section 504]. Although Section 504 has been codified

government employment or provision of services.[28] The EAHCA, an act aimed specifically at the education of children with disabilities, followed in 1975.[29]

1. *Legislative History*

Congress passed the IDEA to remedy the plight of more than eight million children with disabilities in the United States—one million of whom were completely excluded from public school, and the remainder of whom did not receive sufficient services to benefit from their education.[30] The current version of the statute recognizes improvements upon the situation of the children with disabilities described in the original version of the bill, but also notes that "the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."[31] Congress, through the 1997 amendment, announced its higher expectations of states and its commitment to providing

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at a different section number in the United States Code, scholars continue to refer to it as Section 504 of the Rehabilitation Act of 1983. *See, e.g.*, Allan G. Osborne, Jr., *Remedies for a School District's Failure to Provide Services Under IDEA*, 112 EDUC. L. REP. 1, 3 (1996) (referring to "Section 504," but citing to 29 U.S.C. § 794). This Casebrief will follow that convention.

28. *See* 29 U.S.C. § 794. Section 504 provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. § 794(a). The Rehabilitation Act has been used to enforce the right of children with disabilities to reasonable accommodations, thereby enabling them to participate in federally funded programs. *See* Osborne, *supra* note 27, at 3 (detailing provisions of Section 504). Section 504 protects all individuals who have physical or mental impairments that substantially limit at least one of their major life activities, those with a record of such an impairment, and those regarded as having such an impairment. *See* YELL, *supra* note 26, at 61 (defining "handicapped" person as used in Section 504). This Casebrief does not discuss in detail a child's rights under Section 504 however, counsel for a child with disabilities should examine the possibility of recovery under Section 504 as an alternative to recovery under the IDEA. *See id.* at 95-124 (detailing history, principles and purpose of Section 504).

29. *See* Pub. L. No. 94-142, 89 Stat. 773 (1990) (creating EAHCA); ALEXANDER & ALEXANDER, *supra* note 1, at 402 (reporting that both acts were presented to Congress in 1973 and passed thereafter).

30. *See* 121 CONG. REC. 19,482 (1975) (reporting statement made by Senator Randolph of West Virginia).

31. 20 U.S.C. § 1400(c)(4) (2000). This version is the product of several congressional amendments throughout the years. *See generally* Pub. L. No. 101-476, 104 Stat. 1141 (1990); Pub. L. No. 99-457, 100 Stat. 1145 (1986); Pub. L. No. 99-372, 100 Stat. 796 (1986); Pub. L. No. 98-199, 97 Stat. 1357 (1983); Pub. L. No. 95-561, 92 Stat. 2364 (1978).

funding targeted for technology, research and training.[32] The creators of the amendment hoped it would allow educators and parents to cooperate in order to benefit the children as individuals.[33]

The IDEA is a truly bipartisan effort.[34] The original bill passed 83-10 in the Senate and 375-44 in the House of Representatives.[35] In May 1998, the House of Representatives passed the newest amendment by an overwhelming majority of 420-3.[36] The following day, the Senate passed the

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32. *See* H.R. REP. NO. 105-95, at 79. The House of Representatives named the purposes of the Individuals with Disabilities Education Act Amendments of 1997 as to clarify and strengthen the Individuals with Disabilities Education Act ("IDEA") by providing parents and educators with the tools to:

> Preserve the right of children with disabilities to a free appropriate public education; Promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment; Expand and promote opportunities for parents, special education, related services, regular education, and early intervention service providers, and other personnel to work in new partnerships at both the State and local levels; Create incentives to enhance the capacity of schools and other community-based entities to work effectively with children with disabilities and their families, through targeted funding for personnel training, research, media, technology, and the dissemination of technical assistance and best practices.

Id.

33. *See id.* The authors named the purposes of the amendment are to: review, strengthen, and improve IDEA to better educate children with disabilities and enable them to achieve a quality education by:

- Strengthening the role of parents;
- Ensuring access to the general education curriculum and reforms;
- Focusing on teaching and learning while reducing unnecessary paperwork requirements;
- Assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities;
- Giving increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling;
- Ensuring schools are safe and conducive to learning; and
- Encouraging parents and educators to work out their differences by using nonadversarial means.

Id.

34. *See* 143 CONG. REC. S4,410 (1997) (quoting Senator Lott as saying: "The range of expertise and knowledge brought to bear in developing this bill as well as the spirit of bipartisan, bicameral cooperation demonstrated in writing is unprecedented. I have seen nothing like this in my 24 years in Congress.").

35. *See* 121 CONG. REC. 25,543 (1975) (citing House of Representatives Rollcall No. 450); 121 CONG. REC. 19,506 (citing Senate Rollcall Vote No. 227).

36. *See* 143 CONG. REC. H2,567 (daily ed. May 13, 1997) (citing Rollcall No. 124).

bill by a nearly unanimous count of 98-1.[37] Subsequently, President Clinton signed the bill with high approval.[38]

2. *Guarantees*

a. Free Appropriate Public Education

The IDEA mandates that states provide every qualifying child with a "free appropriate public education."[39] A free appropriate public education includes both "special education," which requires instruction of the child in regular classroom subjects and physical education, and "related services," which includes transportation and various support services.[40] Although the education of children with disabilities may cost the state much more than the education of children without such needs, a free appropriate public education is guaranteed to each qualifying child at no additional cost.[41]

The statute provides for preschool, elementary and secondary school education, but it does not cover post-secondary education.[42] The state is to provide the education through an Individualized Education Program

37. *See* 143 CONG. REC. S4,411 (daily ed. May 14, 1997) (citing Rollcall No. 66). The only vote against the bill came from Senator Gorton from Washington, who worried that small school districts would not be able to handle the burden. *See id.* at S4,409 (quoting statement by Senator Gorton).

38. *See* Statement by President William J. Clinton Upon Signing H.R. 5, 33 WEEKLY COMP. PRES. DOC. 833 (June 9, 1997) (noting amendment's building upon success of original bill, which "has made it possible for millions of children with disabilities to receive an education, helping them become productive adults").

39. *See* 20 U.S.C. § 1412(a) (2000) (stating that states, to be eligible for assistance under IDEA, must meet several conditions, one being that it provide free appropriate public education to every disabled child in its jurisdiction between three and twenty-one years of age).

40. 20 U.S.C. § 1401(25) (2000). The IDEA states: "The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including– (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education."

Id. The Act also provides for related services. *See* 20 U.S.C. § 1401(22). The Act defines related services as:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id.

41. *See* 20 U.S.C. § 1401(8) (2000) (defining free appropriate public education as special education and related services provided at public expense).

42. *See id.*

("IEP"), described in the next Section.[43] The state education agency must ensure that school districts are providing each qualifying child with a free appropriate public education.[44]

Although the statute does not define "appropriate education," the Supreme Court set a standard in *Board of Education of Hendrick Hudson Central School District v. Rowley*.[45] In *Rowley*, the Court held that a child with a severe hearing impairment, who sued for provision of a sign language interpreter, did not require such an interpreter to receive an appropriate education.[46] The Court stated that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide education benefit to the handicapped child."[47] Based on findings that the school district provided the child with both personalized instruction and related services designed to meet her needs, and the lack of a finding suggesting that the child was not benefiting from her education with an interpreter, the Court held that the school district was providing an appropriate education.[48] Accordingly, it affirmed judgment for the school district.[49]

b. Individualized Educational Program

As part of the requirement to provide a free appropriate public education to each child with a disability, the state must create and implement an IEP for each such child.[50] The IEP must include an assessment of the child's current level of education, a statement of "measurable annual

43. For a discussion of Individualized Education Programs, see *infra* notes 50-52 and accompanying text.

44. *See* 20 U.S.C. § 1412(a)(11) (2000) (defining obligations of state educational agency).

45. 458 U.S. 176 (1982).

46. *See id.* at 184, 209-10.

47. *Id.* at 201. The Court's reference to the IDEA as a "floor" means that states are free to mandate higher standards. *See* Streett, *supra* note 1, at 46 (stating that until 1989 Arkansas held its school districts to higher standard).

There has been a great deal of litigation regarding the exact meaning of the Court's mandate. *See* GUERNSEY & KLARE, *supra* note 26, at 29-30 (discussing litigation in wake of *Rowley* decision). The Third Circuit requires the educational benefits be more than trivial. *See* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988) ("We hold that the [IDEA] calls for more than a trivial educational benefit."). The Third Circuit has also indicated that even if the child is incapable of progressing from grade to grade, the school district must ensure he or she is making some progress. *See* Bd. of Educ. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986) ("The Act . . . requires a plan likely to produce progress, not regression or trivial educational advancement.").

48. *See Rowley*, 458 U.S. at 209.

49. *See id.* at 209-10 (citing district court finding that school district provided child with "adequate education").

50. *See* 20 U.S.C. § 1401(11) (2000) (defining IEP). The statute states: "The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d) [*20 USCS § 1414*(d)]." *Id.*

goals," and a description of the type, frequency and duration of special education and related services that the state will provide the child for the upcoming period.[51] The statute designates a team to design the IEP and to review it at least annually.[52]

c. Least Restrictive Environment

The IDEA takes the policy stance that children with disabilities should be educated alongside their non-disabled peers as much as possible.[53] Segregation from the regular classroom is permissible only when necessary for the child to receive an appropriate education.[54] The school district must always consider whether the provision of supplemental aids or services in the regular classroom would allow the child to receive an appropriate education before it may look to more restrictive environments.[55]

3. *Remedies*

The IDEA provides that courts "shall grant such relief as the court determines appropriate."[56] To compensate for lost educational time,

51. *See* 20 U.S.C. § 1414(d)(1)(A) (2000) (detailing specific requirements for content of IEPs).

52. *See* 20 U.S.C. § 1414(d)(4) (2000) (allowing for review of IEP as frequently as IEP team deems necessary, but mandating at least one review per year). The IEP team consists of parents, a regular education teacher, a special education teacher, a representative of the local educational agency and, when appropriate, the child. *See* 20 U.S.C. § 1414(d)(1)(B) (defining term "IEP team"). In addition, the parents or agency have the right to include another special education specialist. *See id.* School districts often implement policies to hold an "annual review" for each child with a disability either at the beginning or the end of the school year. *See* Streett, *supra* note 1, at 40 (reviewing school district policies generally).

53. *See* 20 U.S.C. § 1412(a)(5) (2000) (calling for education of children with disabilities with remainder of student population "[t]o the maximum extent appropriate"); Oberti v. Bd. of Educ., 995 F.2d 1204, 1214 (3d Cir. 1993) (finding "strong congressional preference" for educating children with disabilities in regular classroom). The circuits have developed different tests for whether a child has been placed in the least restrictive environment. *See* Streett, *supra* note 1, at 47-49 (reviewing application of *Rowley* to least restrictive environment requirement).

54. *See Oberti*, 995 F.2d at 1214 (recognizing difficulty of balancing mainstreaming requirement with mandate to provide appropriate education); Streett, *supra* note 1, at 46-47 (stating that IDEA realizes that some children need to be in special classes, separate schools, residential facilities, hospitals or homes in order to receive free appropriate public education).

55. *See* 20 U.S.C. § 1412(a)(5) ("[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."); *see also Oberti*, 995 F.2d at 1214 (suggesting that use of "supplementary aids and services" is key to providing children with disabilities with appropriate education in regular classroom).

56. 20 U.S.C. § 1415(i)(2)(B)(iii) (2000).

courts have granted tuition reimbursement, compensatory education and monetary damages.[57]

a. Tuition Reimbursement

The Supreme Court in *School Committee of Town of Burlington v. Department of Education*[58] decided that the IDEA gives federal courts the power to compel school districts to reimburse parents for tuition paid to a private school when the school district was not providing an appropriate education.[59] In *Burlington*, the state agency determined that the learning disabled child at issue, needed to be placed in a private school, such as the one his father had placed him in, to receive an appropriate education.[60] Based on practical considerations, as well as statutory interpretation and congressional intent, the Court held that the district court was justified in enforcing the state's order that the school district reimburse the child's father for the tuition payments that he had already made.[61]

The Court began its analysis with an examination of the statutory demands on federal district courts hearing appeals of IDEA cases.[62] Courts "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."[63] Noting that Congress does not define what relief it considers "appropriate," the Court construed the word in accordance with the purpose of the IDEA.[64] It took the purpose of the Act from the opening paragraphs of the IDEA: "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected."[65]

57. *See* ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 176 (1996) (discussing available forms of remedies).

58. 471 U.S. 359 (1985).

59. *See id.* at 369 (examining statutory grant of authority to federal courts and framing issue in case as whether scope of authority extends to forced tuition reimbursement).

60. *See id.* at 363 (citing decision by Massachusetts Department of Education's Bureau of Special Education Appeals finding that: (1) school district's proposed IEP was inappropriate and (2) father's choice of private placement was least restrictive appropriate program).

61. *See id.* at 369 ("We conclude that the Act authorizes such reimbursement.").

62. *See id.*

63. *See id.* (citing statutory language in prior version of IDEA at 20 U.S.C. § 1415(e)(2) (2000)).

64. *See id.* at 369 (noting that interpretation of word in statute in light of statute's purpose is only possible interpretation where no other definition is found).

65. *Id.* at 367 (quoting 20 U.S.C. § 1400(c) (1997)). The 1997 amendments to the IDEA replaced the quoted statement with the following: "Improving educational results for children with disabilities is an essential element of our national

In keeping with the spirit of the IDEA, the Court considered the effect that denying parents tuition reimbursements would have on the accomplishment of the Act's goals.[66] The Court posited that for a court to confirm that a parent's child needed to be moved to a private school to get an appropriate education, without providing reimbursement, would be an "empty victory."[67] In addition, granting reimbursement would not hinder school districts in helping other children, but would merely make the district fulfill its original duty.[68] Therefore, *Burlington* held that tuition reimbursement is a proper remedy for an IDEA violation.[69]

Once explicitly authorized by the Supreme Court, tuition reimbursement became routinely used by courts in all circuits.[70] The Third Circuit recently approved an award of tuition reimbursement in *Ridgewood Board of Education v. M.E.*[71] The school district in *Ridgewood* implemented an IEP

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policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1) (1997).

66. *See Burlington*, 471 U.S. at 367-69 (applying congressional purpose in enacting IDEA to situation faced by child's father).

67. *Id.* at 370.

68. *See id.* at 370-71 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.").

69. *See id.* at 374 (holding that "such relief as the court determines is appropriate" includes tuition reimbursement).

In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), the United States Supreme Court held that failure of a private placement to meet section 1401 requirements does not bar reimbursement. *See id.* at 13-15. The parents in *Florence* placed their child with a disability in a private school that provided her an appropriate education, but did not meet the requirements of section 1401(a)(18). *See id.* at 12-13 (naming as issues settled, "(1) the school district's proposed IEP was inappropriate under IDEA, and (2) although [the private school] did not meet the section 1401(a)(18) requirements, it provided an education otherwise proper under IDEA"). The Court pointed out that anytime parents move their children to private schools to ensure an appropriate education, the chosen school will not meet the requirement that it be "provided at the public expense, under public supervision and direction." *See id.* at 14. To remain consistent with *Burlington*'s express authorization for parents to move their children to private schools if necessary, the Court held that the private placements need not meet section 1401 requirements. *See id.*

The Court also held that unilateral private placements are not invalid simply because the private school does not meet all of the state's education standards or appear on the state's list of approved private schools. *See id.* at 14-15. The private school at issue in *Florence* failed to meet South Carolina's requirements that it employ only state certified teachers and develop IEPs. *See id.* at 13 (finding that school's employment of at least two teachers who were not state certified and lack of procedure for IEPs did not bar parents' reimbursement).

70. *See* OSBORNE, *supra* note 57, at 176 (noting that availability of reimbursement is "well settled").

71. 172 F.3d 238 (3d Cir. 1999). The Third Circuit has approved awards of tuition reimbursements in other cases as well. *See, e.g.*, Warren G. *ex rel.* Tom G. v. Cumberland County School Dist., 190 F.3d 80, 86 (3d Cir. 1999) (reversing trial court's denial of tuition reimbursement).

that was so ineffective for the child that the school changed his grades to pass/fail to protect his self-esteem.[72] When the school district proposed a new IEP, the parents objected and enrolled the child in a private school, where he made "considerable progress."[73] Although the Third Circuit had to remand the case to ensure the proper assessment of the IEP's appropriateness, it made clear that the parents should have been reimbursed if the proposed IEP was inappropriate.[74]

b. Compensatory Education

Compensatory education consists of an award of educational services in addition to those normally due a child under the law.[75] Although the Supreme Court has never directly addressed the availability of compensatory education under the IDEA, circuit courts have granted it as a remedy.[76] The lower courts find their justification for granting compensatory education from the Supreme Court's decision in *Burlington*.[77]

The United States Court of Appeals for the Eighth Circuit decided the first case in which a student with a disability received compensatory education as a remedy for his school's violation of the IDEA in *Miener v. Missouri*.[78] *Miener* concerned a fourteen-year-old girl who, as a result of several operations to remove tumors from her brain, suffered from educational, emotional and behavioral disorders.[79] The school district evaluated the girl as in need of special education, but failed to provide services.[80] Meiner's father could not afford to place her in a private school and had to opt for a state-run residential health facility.[81] The court reasoned that neither Congress nor the Supreme Court could intend that children whose parents can afford private school should get

72. *See Ridgewood Bd. of Educ.*, 172 F.3d at 244 (reporting child's failure to progress despite provision of individual reading tutoring, resource center instruction in English, and supplementary instruction in science and social studies).

73. *See id.* at 245 (noting that parents thought school district could not properly educate their son and placed him at private school that specialized in educating children with learning disabilities).

74. *See id.* at 248 (stating that student may be entitled to reimbursement if he meets his burden under *Florence*).

75. *See* YELL, *supra* note 26, at 300 (defining compensatory education). The additional services are generally provided after the child has reached the age of twenty-one, but may be provided during the summer or after school while the child is still covered by the IDEA. *See id.*

76. *See, e.g.*, M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) (holding plaintiff was entitled to compensatory education); Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986) (same).

77. *See Miener*, 673 F.2d at 982 ("We view the request for compensatory services as practically indistinguishable from a request for . . . reimbursement [under *Burlington*].").

78. 800 F.2d 749 (8th Cir. 1986).

79. *See id.* at 751 (recounting child's medical history).

80. *See id.*

81. *See id.*

their full entitlement to a free appropriate public education, with reimbursement under *Burlington*, while those who cannot afford private school must lose some amount of education.[82] As a result, the court granted compensatory education.[83]

Most circuits have followed *Miener* and recognize the availability of compensatory education, albeit under different standards of school district liability.[84] The Third Circuit solidified its standard for the award of compensatory education in *M.C. v. Central Regional School District*.[85] At issue was a boy suffering from severe mental retardation whose obvious need for residential care was ignored by the school district.[86] The court summarized its holding as follows:

> [A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.[87]

As a result, the Third Circuit will award compensatory education if the student proves that the school district knew or should have known it was providing an inappropriate education.[88]

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82. *See id.* at 753 ("We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs.").

83. *See id.* at 754 (directing district court to award compensatory education if it found school district failed to provide appropriate education).

84. *See* Erickson v. Albuquerque, 199 F.3d 1116, 1123 (10th Cir. 1999) (acknowledging student's right to compensatory education if he proved denial of free appropriate public education); Bd. of Educ. v. Ill. State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996) (recognizing award of compensatory education as appropriate in light of *Burlington*); Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1496 (9th Cir. 1994) ("There is no question that the district court had the power to order compensatory education"); Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 188 (1st Cir. 1993) ("[W]e have no difficulty in joining those circuits that have decided that compensatory education is available to remedy past deprivations."). *But see* Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 150-51 (N.D.N.Y. 1997) (denying availability of compensatory education past age of twenty-one where student did not prove gross violation of IDEA), *aff'd*, 208 F.3d 204 (2d Cir. 2000).

85. 81 F.3d 389 (3d Cir. 1996).

86. *See id.* at 392-94 (describing child's regression in ability to perform essential self-care functions, such as dressing himself, and noting that experts recognize that it is easier for individuals with severe retardation to learn self-care skills in residential setting).

87. *Id.* at 397.

88. *See id.* (establishing student's burden); *see also* Ridgewood Bd. of Educ. v. M.E., 172 F.3d 238, 250 (3d Cir. 1999) (reiterating "knew or should have known" standard).

c. Monetary Damages

Courts have struggled with the question of whether monetary damages for failure to provide an appropriate education are available under 42 U.S.C. § 1983 for an IDEA violation.[89] Section 1983 provides a mechanism for citizens to secure remedies for violations of federal statutes by state actors.[90] Although both Congress and the Supreme Court have weighed in on the issue, the circuits remain split on the availability of monetary damages under § 1983.[91]

In *Smith v. Robinson*,[92] the Supreme Court expressed its opinion that monetary damages are not available under § 1983 for IDEA violations.[93] Congress reacted to the *Smith* decision by enacting the Handicapped Children's Protection Act of 1986, which stated that "[n]othing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973,

89. *See* Osborne, *supra* note 27, at 14-20 (examining use of damages in various courts). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000). The term "damages," as used in the field of special education law, refers to punitive awards and does not include tuition reimbursement, compensatory education or attorney fees. *See* Osborne, *supra* note 27, at 14 (specifying meaning of damages).

Damages may also be available under Section 504 of the Rehabilitation Act. *See* Osborne, *supra* note 27, at 18 (citing *Whitehead v. Sch. Dist. for Hillsborough County*, 918 F. Supp. 1515 (M.D. Fla. 1996), which awarded monetary damages under Section 504 for intentional discrimination and retaliatory action by school district). This Casebrief does not explore rights and remedies under the Rehabilitation Act.

90. *See* Gail Paulus Sorenson, *School District Liability for Federal Civil Rights Violations Under Section 1983*, 76 EDUC. L. REP. 313, 314-16 (1993) (describing history and workings of § 1983).

91. *See* Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1272 n.5 (9th Cir. 2000) (examining case law in several circuits); Osborne, *supra* note 27, at 16 (discussing damages for failure to provide appropriate education).

92. 468 U.S. 992 (1984).

93. *See id.* at 1012 ("We . . . conclude that Congress intended to preclude reliance on § 1983 as a remedy . . . ."). The Court found that "Congress intended the [IDEA] to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." *Id.* at 1009. This decision was based on: (1) the comprehensiveness of procedures and guarantees under IDEA and (2) Congress' design placing primary responsibility on state and local agencies and parents. *See id.* at 1009-11 (expressing opinion that statute must be construed to not render any language superfluous and that federal district courts are not as good as state and local actors at dealing with issues of education). Justice Brennan's dissent argued that the Court must let § 1983 operate to the extent that it is not repugnant to the IDEA so plaintiffs can make § 1983 claims after exhausting IDEA procedures. *See id.* at 1023-24 (Brennan, J., dissenting).

or other Federal statutes protecting the rights of handicapped children and youth . . . ."[94] The circuits are split on whether this provision reversed *Smith* to the extent that it denied the possibility of recovery under § 1983 for IDEA violations.[95]

The Supreme Court, in a 1992 Title IX case, *Franklin v. Gwinnett County Public Schools*,[96] supported the courts and scholars arguing for the availability of compensatory damages.[97] The Court expressed the theory that a determination of what rights are guaranteed by federal statutes and what remedies are available to compensate the injured party are analytically different.[98] Therefore, even if a court finds that a child has a right to pursue a claim for an IDEA violation under § 1983, it still has to decide whether the remedy of monetary damages is available.[99] In *Franklin*, the Court first acknowledged a plaintiff's implied right under Title IX, then turned to the question of the availability of monetary damages.[100] The *Franklin* Court held that courts should "presume the availability of all appropriate remedies unless Congress had expressly indicated otherwise."[101]

The Third Circuit is among those that have interpreted section 1415(l) and *Franklin* to mean that parties injured by violations of the IDEA may seek damages under § 1983.[102] In *W.B. v. Matula*,[103] a case discussed more fully below, the Third Circuit reviewed a case in which the school district refused to provide the plaintiff child with IDEA services until com-

94. Pub. L. No. 99-372, § 3(f), 100 Stat. 1145 (codified as amended at 20 U.S.C. § 1415(l) (2000)). The current provision reads: "Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . ."

20 U.S.C. § 1415(l) (2000).

95. *See* STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION 251-58 (Oakstone Legal & Bus. Publ'g ed., 17th ed. 2000) (collecting cases in which courts have gone both ways on question of effect of section 1415(l) on *Smith* holding).

96. 503 U.S. 60 (1992).

97. *See generally.*

98. *See id.* at 65-66 (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979)).

99. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 493-95 (3d Cir. 1995) (analyzing first existence of § 1983 right of action, then addressing question of availability of damages).

100. *See Franklin*, 503 U.S. at 65 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979)).

101. *Id.* at 66.

102. *See Matula*, 67 F.3d at 494 ("In enacting § 1415(f), Congress specifically intended that EHA violations could be redressed by . . . § 1983 actions . . . ."). Indeed, courts in the Third Circuit had granted compensatory damages even before *Franklin*. *See* Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990) ("We conclude that Congress empowered the courts to grant a compensatory remedy."); Bd. of Educ. v. Diamond *ex rel.* Diamond, 808 F.2d 987, 995 (3d Cir. 1986) (arguing that HCPA adopted Justice Brennan's dissenting view in *Smith*, which would allow monetary damages).

103. 67 F.3d 484 (3d Cir. 1995).

pelled do so to by an administrative ruling.[104] The child, who suffered from Tourette's Syndrome, a severe obsessive-compulsive disorder, and Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder ("ADHD"), struggled through first and second grade with no support services.[105] The Third Circuit, following the reasoning of *Franklin*, held that damages under § 1983 are available because the IDEA does not exclude them and the legislative history of the Act and its amendments indicate that monetary damages should be available.[106]

At least one circuit, however, continues to deny children compensatory damages for violations of the IDEA.[107] In *ex rel. Sellers v. School Board of the City of Manassas*,[108] the United States Court of Appeals for the Fourth Circuit reviewed a case in which the plaintiff, who was eighteen-years-old, had just recently been diagnosed as learning disabled and emotionally disturbed.[109] He and his parents unsuccessfully sought compensatory damages under the IDEA, arguing that the school district should have known the plaintiff required special education services as early as fourth grade.[110] The Fourth Circuit affirmed, citing the fact that, although section 1415(l) expressly preserves children's rights under the Rehabilitation Act and the Constitution, it does not mention § 1983.[111] In addition, the court found that monetary damages are "simply inconsistent with IDEA's statutory scheme."[112] It reasoned, therefore, that Congress' enactment of section 1415(l) did not overrule *Smith*'s ruling that remedies under other statutes are not available for violations of the IDEA.[113]

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104. *See id.* at 489-90 (reporting administrative order requiring the school district to pay for child's education at private school and therapy).

105. *See id.* (describing extent of child's disabilities and noting that school district fought mother's requests for evaluations and services at every step of process).

106. *See id.* at 493-95 (examining text of IDEA and discussing Senate Report, House Report and House Conference Report). The court could not grant any damages to the plaintiff, however, because a prior legal settlement between the parties prohibited the new action. *See id.* at 502 (affirming grant of summary judgment for defendants on IDEA claim).

107. *See* Padilla *ex rel.* Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1273 (10th Cir. 2000) (adopting Fourth Circuit's rationale); Sellers *ex rel.* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998) ("[W]e hold that parties may not sue under section 1983 for an IDEA violation."); *see also* Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (holding monetary damages unavailable under IDEA), *aff'd*, 208 F.3d 204 (2d Cir. 2000) (same).

108. 141 F.3d 524 (4th Cir. 1998).

109. *See id.* at 525-26.

110. *See id.* (describing elements of complaint and denial of compensatory damages by administrative law judge and trial court).

111. *See id.* at 530 (arguing that section 1415(l)'s reference to preservation of rights under "*other Federal statutes*" cannot refer to § 1983, which does not refer to education or disabilities).

112. *Id.* at 527.

113. *See id.* at 530 (stating that if Congress meant to overrule *Robinson* on the point of remedies it would have explicitly done so).

III. REMEDIES FOR IDEA VIOLATIONS IN THE THIRD CIRCUIT

A. *Tuition Reimbursement*

The Court of Appeals for the Third Circuit interpreted the right to reimbursement in *Ridgewood Board of Education v. M.E.*[114] The *Ridgewood* court summarized the Supreme Court's decisions regarding the IDEA as requiring that a student prove that: (1) the public school IEP is inappropriate; and (2) the private school placement is proper under the IDEA.[115] In *Ridgewood* and several other cases, the Third Circuit construed these requirements so as to place a minimal burden on the student.[116]

As interpreted by the Third Circuit, the child's first burden is to prove that the IEP designed and sought to be implemented was inappropriate.[117] The district court in *Ridgewood* required the child to go further and show that *any* type education in the public setting could not provide an appropriate education.[118] The circuit court rejected this interpretation and held that a child need not prove that he or she could theoretically get an appropriate education in the public setting, but need only prove that he or she would not get an appropriate education under the IEP that the school district insisted on using.[119]

As to the second burden for the child—to prove that the private placement is proper—the Third Circuit does not require that the private education be perfect.[120] A private placement is proper if it is "appropriate" and constitutes the least restrictive environment.[121] A private school is not improper simply because it provides a more restrictive environment

114. *See generally* Ridgewood Bd. of Educ. v. M.E., 172 F.3d 238 (3d Cir. 1999). For a discussion of the *Ridgewood* case, see *supra* notes 71-74 and accompanying text. For a discussion of the Supreme Court's holding on tuition reimbursement, see *supra* notes 58-74 and accompanying text.

115. *See Ridgewood*, 172 F.3d at 248 (adopting interpretation of United States Court of Appeals for the Second Circuit in *Walczak v. Florida Union Free School District*, 142 F.3d 119, 129 (2d Cir. 1998)).

116. *See* T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 581-82 (3d Cir. 2000) (minimizing student burden by not requiring showing that private school placement is "least restrictive environment"); Warren G. *ex rel.* Tom G. v. Cumberland County Sch. Dist., 190 F.3d 80, 83-84 (3d Cir. 1999) (same); *Ridgewood*, 172 F.3d at 248-49 (same).

117. For a discussion of private placement issues, *see supra* note 82 and accompanying text.

118. *See Ridgewood*, 172 F.3d at 248 (noting that although district court found public IEP was appropriate, district court indicated that there was "no evidence in the record suggesting that [the IEP was] not appropriate to provide educational services for [the plaintiff] in a public setting").

119. *See id.* at 248-49 ("Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education.").

120. *See id.* at 248 (listing requirements imposed by *Florence*).

121. *See id.* at 248-49 & n.8 (explaining child's burdens (citing *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993)). For a discussion of the definitions of free appropriate education and least restrictive environment, see *supra* notes 39-55 and accompanying text.

than the school district would provide.[122] The Third Circuit indicated in 1999 that "the test for the parents' private placement is that it is appropriate, and not that it is perfect."[123] As a result, a court should only consider whether the chosen school provided an appropriate education, rather than look at all available private schools to locate the least restrictive appropriate one.[124]

B. *Compensatory Education*

The Third Circuit allows the award of compensatory education under a negligence-like standard, rather than upon proof of bad faith or gross violation.[125] Its decision in *M.C. v. Central Regional School District* established both the child's burden to qualify for compensatory education and the proper manner to measure the size of the award.[126] The Third Circuit's position, that compensatory education is available to any student who can show the school district knew or should have known that his or her IEP was inappropriate, is based on prior case law and the language of the IDEA itself.[127]

In adopting the negligence-like standard, the Third Circuit rejected standards proposed by other circuits and by the district court in the case.[128] The court rejected the Second Circuit's requirement that the stu-

122. *See* Warren G. *ex rel.* Tom G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (discussing placement in school that only educated children with disabilities).

123. *Id.*

124. *See id.* (citing *Ridgewood* and agreeing with United States Court of Appeals for Seventh Circuit in *Board of Education v. Illinois State Board of Education*, 41 F.3d 1162 (7th Cir. 1994)).

The court had to apply these standards to a unique situation in *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3d Cir. 2000). The child at issue in *T.R.* was a preschooler whose parents wanted to keep him at his private preschool at the state's expense. *See id.* at 575-76. The school district offered the child half-days of school in its resource room and half-days in its preschool class, which consisted of half children with disabilities and half children without disabilities. *See id.* at 576. Thus, both the public IEP and the private school placement provided an appropriate education, but the private school provided a less restrictive environment. *See id.* at 580-81. The court held that if a private school is among the accredited schools in the state, the school district must consider it when developing an IEP. *See id.* at 582. Therefore, a parent may be entitled to reimbursement if he or she proves that the public school placement was inappropriate because a private school provided the least restrictive appropriate placement. *See id.* at 580 (presenting possibility that less restrictive private placement may be proper education).

125. *See* M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 391-92 (3d Cir. 1996) (stating that award of compensatory education is proper when "school district . . . knows or should know that a child has an inappropriate [IEP]").

126. *See id.* at 397 (summarizing holding).

127. *See id.* at 395-96 (basing decision on *Lester H. v. Gihool*, 916 F.2d 865 (3d Cir. 1990); *Carlisle Area School District v. Scott P. ex rel. Bess P.*, 62 F.3d 520 (3d Cir. 1995); and 20 U.S.C. § 1414(a)(5) (2000)).

128. *See id.* at 395-96 (discussing district court's holding that defendant school district's proof of good faith precluded award of compensatory education and Sec-

dent show a "gross violation" of the IDEA by the school district to qualify for compensatory education.[129] The Third Circuit also refused to require that a student prove bad faith on the part of the school district, although it has noted that most cases awarding compensatory education involve "quite culpable conduct."[130] Nor would the Third Circuit allow the school district to escape liability simply by showing it acted in good faith, as the district court had in *M.C.*[131]

The *M.C.* court rejected these standards because it insisted that the standard be grounded within the IDEA itself.[132] To this end, the court began its analysis with the IEP, "the road map for a disabled child's education," as guaranteed by the IDEA.[133] The court held that a child is entitled to compensatory education whenever his or her IEP fails to meet the Third Circuit's standard for appropriate education.[134] Therefore, the child's burden to get an award of compensatory education is to prove the school district knew or should have known that his or her IEP was failing to confer more than a de minimus educational benefit.[135]

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ond Circuit's requirement of gross violation of IDEA for award of compensatory education).

129. *See id.* at 396 (rejecting standard used in *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990), which required showing of "gross violation," defined as coercion of child with disability into terminating his or her education).

130. *See id.* at 396 (citing *Carlisle*). The first case in which the Third Circuit awarded compensatory education involved egregious circumstances. *See generally Carlisle*, 62 F.3d at 536 (citing *Lester H.* as support for the statement that "[w]e have held that compensatory education is available to respond to situations where a school district flagrantly fails to comply with the requirements of IDEA"); Lester H. v. Gilhool, 916 F.2d 865, (3d Cir. 1990) (finding school district unreasonably delayed student-plaintiff's placement in appropriate educational program for no reason). Lester H. was profoundly retarded and suffered from behavioral problems so severe that it became necessary to place him in residential care. *See Lester H.*, 916 F.2d at 867 (noting that in 1984, Lester's private day school and school district agreed that he required residential placement to make any educational progress). While Lester waited at home for a placement, the school district conducted a limited search, which took thirty months, to find an institution to accept Lester. *See id.* During this time, the school district implemented an at-home IEP that provided Lester with only five hours of instruction per week. *See id.* The Court of Appeals affirmed Lester's right to compensatory education created by the school district's negligent failure to ensure his appropriate education. *See id.* at 873 (affirming award because school district "had no reason to delay a proper placement for Lester").

131. *See M.C.*, 81 F.3d at 395-96 (rejecting district court's reliance on fact that school district believed in good faith that IEP was appropriate).

132. *See id.* at 396 (stating that neither lower court's nor Second Circuit's standards were appropriate because they were both imprecise and not anchored in IDEA).

133. *See id.* ("If the compensatory education standard is to spring from the Act, it must focus from the outset upon the IEP . . . .").

134. *See id.* (focusing on statute's guarantee of appropriate education).

135. *See id.* at 396 n.6 (noting that standard is consistent with decision in which Third Circuit held that it is necessary, but not sufficient, for a child to show that some IEP was inappropriate before compensatory education is an appropriate remedy).

The court's holding in *M.C.* is not so narrow that it is inapplicable where a student had no IEP, as in *Ridgewood.*[136] The school district in *Ridgewood* did not classify the student at issue as a child with a disability or develop an IEP for him until he had finished seventh grade.[137] The Third Circuit held that the IDEA guarantees every child with a disability "an appropriate education, not merely an appropriate IEP."[138] Therefore, the child need only show that the school district provided an inappropriate education, regardless of whether that education was in the form of an IEP.[139]

Once a student has proved his or her right to compensatory education, the Third Circuit awards the education based on the length of time that the student proved the school district failed to provide an appropriate education.[140] The *M.C.* court established the rule that a child deserves compensatory education for a time equal to the period after the school district knew or should have known the child was not receiving an appropriate education, minus a reasonable period for the school district to have corrected the situation if it acted promptly.[141] The court expressed its opinion that the preceding standard protects the child's rights to the maximum extent possible, while not being overly burdensome on school districts.[142]

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136. 172 F.3d 238, 249-50 (3d Cir. 1999) (rejecting narrow interpretation of *M.C.*'s requirement of proof of "inappropriate IEP" for award of compensatory education).

137. *See id.* at 244-45.

138. *Id.* at 250.

139. *See id.* (noting that *M.C.* decision itself "held the denial of an appropriate education—and not merely the denial of an appropriate IEP—creates the right to compensatory education"). *Ridgewood* also rejected the school district's argument that education is presumptively appropriate if parents do not object. *See id.* (arguing that child's right to education does not depend on parent's vigilance).

140. *See M.C.*, 81 F.3d at 397.

141. *See id.*

142. *See id.* ("We believe that this formula harmonizes the interests of the child, who is entitled to a free appropriate education under IDEA, with those of the school district, to whom special education and compensatory education is quite costly."). *But see* John T. v. Del. County Intermediate Unit, No. 98-5781, 2000 U.S. Dist. LEXIS 6169, at *24 (E.D. Pa. May 8, 2000) (noting limits on extent remedies can make child whole by stating that, while child did not qualify for compensatory education, even if he did, "compensatory education after age 21 would not satisfactorily remedy denial of special services to [child] during his crucial early educational years").

The court had previously dealt with the argument that grants of compensatory education are invalid assessments of future educational needs. In *Lester H. v. Gilhool,* the Third Circuit agreed with the defendant school district that no court could speculate at trial what services a child with a disability will need in the future to make educational progress. *See Lester H.*, 916 F.2d 865, 868-69 (3d Cir. 1990) (striking down arguments that issue was not ripe and that remedy was too speculative). The court held that grants of compensatory education based on the period of education denied are not speculative. *See id.* (noting that compensatory education orders should ensure opportunity for appropriate authorities to alter the remedy in the future).

C. *Monetary Damages*

The Third Circuit stands out among circuits because of its long recognition that children who have been denied appropriate education may deserve monetary damages.[143] In *W.B. v. Matula*, the Third Circuit Court of Appeals made a detailed analysis of the interplay between § 1983, the IDEA and the Supreme Court's ruling in *Franklin v. Gwinnett County Public Schools*.[144] The *Matula* court concluded that "[i]n enacting § 1415(l), Congress specifically intended that [IDEA] violations could be redressed by . . . § 1983 actions."[145]

The court began its analysis with a general discussion of § 1983, which provides a mechanism for plaintiffs to secure a remedy for violations of federal statutes by state actors.[146] Because § 1983 rights are statutory, however, their availability depends on congressional intent.[147]

The court determined congressional intent to make remedies available under § 1983 by relying on section 1415(l) and legislative history.[148] It argued that § 1983 is a federal statute and, as such, is covered by section 1415(l)'s statement that "[n]othing in this chapter shall be construed to restrict or limit the . . . remedies available under . . . other Federal statutes . . . ."[149] In addition, the court cited to a House of Representatives report which stated: "[I]t has been Congress' intent to permit parents or guardians to pursue the rights of handicapped children through . . . section 1983 . . . . Congressional intent was ignored by the U.S. Supreme Court when . . . it handed down its decision in *Smith v. Robinson*."[150] From these sources, the court concluded that Congress did intend § 1983 to provide a right of private action for IDEA violations.[151]

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143. *See* W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995) (holding that compensatory damages are available for IDEA violations); Bd. of Educ. v. Diamond, 808 F.2d 987, 995 (3d Cir. 1986) (concluding that Congress' enactment of section 1415(l) reinstated right to monetary damages under § 1983 for IDEA violations).

144. 503 U.S. 60 (1992). For a discussion of *Franklin*, see *supra* notes 66, 97-101. For a discussion of the facts of *Matula*, see *supra* notes 103-05 and accompanying text. The *Matula* court looked to *Franklin*, a case dealing with Title IX, because the Supreme Court used that case to establish a general rule for remedies available under federal statutes. *See Matula*, 67 F.3d at 494 (analyzing availability of monetary damages under § 1983 and IDEA).

145. *Matula*, 67 F.3d at 494.

146. *See id.* at 493 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1983), which settled application of § 1983 to statutory, as well as constitutional, claims).

147. *See id.* (citing *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987)).

148. *See id.* at 493-94.

149. *See id.* at 493 (citing 20 U.S.C. § 1415(f) (2000)). The House of Representatives also concluded that section 1415(l) referred to § 1983. *See* H.R. REP. NO. 99-296, at 6-7 (1985) (stating that "other federal statutes" as used in section 1415(l) includes § 1983).

150. *See id.* at 494 (quoting H.R. REP. NO. 99-296 (1985)).

151. *See id.*

Once a right under § 1983 was confirmed, the court looked to *Franklin* to decide whether a remedy was available.[152] It thus began with a presumption that all appropriate remedies, including monetary damages, are available.[153] The *Matula* court then examined the text and history of the IDEA and found no expression of congressional intent to disallow monetary damages.[154] It must be noted, however, that the court did encourage trial judges to award monetary damages only if tuition reimbursement and compensatory education could not make the child whole.[155] Although the Third Circuit has been reluctant to award monetary damages since *W.B.*, it has recently acknowledged the availability of compensatory damages under § 1983.[156]

IV. CONCLUSION: A PRACTITIONER'S GUIDE

Practitioners need to take advantage of the Third Circuit's willingness to grant several forms of remedies for IDEA violations. When the child's parents have paid for the child to be educated by a private school, a request should be made for tuition reimbursement.[157] If the child was not moved to a private school, counsel must argue for compensatory education and monetary damages.[158] If the child and parents think that the school district will provide satisfactory compensatory education, there is no need to pray for monetary damages.[159] If the school district has been uncooperative and negligent, or if it flagrantly violated the IDEA, counsel should apply for monetary damages with an alternative plea for compensatory education.[160]

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152. *See id.* (looking to *Franklin v. Gwinnett County Public School*, 503 U.S. 6 (1992).

153. *See id.* (citing *Franklin*, 503 U.S. at 66, and Court's direction that lower courts look to text and history of statute to determine if Congress intended right of action, but presume availability of "all appropriate remedies," unless Congress indicated otherwise).

154. *See id.* at 494-95 (observing that section 1415(f) does not make any restriction on remedies and that legislative history indicates Congress intended courts would consider remedies not specifically mentioned in IDEA).

155. *See id.* at 496 ("We caution that in fashioning a remedy for an IDEA violation, a district court may wish to order . . . compensatory education . . . or reimbursement for providing at private expense what should have been offered by the school, rather than compensatory damages for generalized pain and suffering.").

156. *See* Ridgewood Bd. of Educ. v. M.E., 172 F.3d 238, 252 (3d Cir. 1999) ("[W]e must follow our decision in *W.B. v. Matula* . . . which held that IDEA claims may be actionable under § 1983.").

157. *See* Osborne, *supra* note 27, at 5 (stating that parents may be entitled to reimbursement if they prevail in having placement deemed appropriate).

158. *See id.* at 9-19 (presenting options for child who remained in public school despite inappropriateness of education).

159. *Cf. Matula*, 67 F.3d at 495 (urging trial courts to award compensatory education before monetary damages); Osborne, *supra* note 27, at 18-19 (noting that award of damages under § 1983 is controversial and difficult to win).

160. *See* Osborne, *supra* note 27, at 20 (stating that claims for monetary damages usually arise from intentional discrimination or bad faith).

Although tuition reimbursement is not a controversial remedy, counsel representing a child needs to fulfill two burdens.[161] First, he or she must prove that the IEP proposed by the school district was inappropriate because it failed to confer more than a de minimus educational benefit.[162] Second, counsel must show that the private placement was appropriate, that it conferred more than a de minimus educational benefit, and that it was not excessively restrictive.[163] The Third Circuit's *Ridgewood* decision provides the practitioner with a road map for these arguments and should be cited as authority.[164]

To win compensatory education, the practitioner must convince the judge that the school district knew or should have known the child's IEP was inappropriate and subsequently failed to act promptly to correct the situation.[165] The date that the school district knew or should have known that the IEP was not appropriate is important because the award will be measured based on that date.[166] The child's counsel does not need to delve into *why* the IEP was inappropriate or why the district did not take remedial action right away.[167]

Although monetary damages are available, Third Circuit courts have expressed a reluctance to award them.[168] To receive monetary damages, counsel should make the case that no other remedy would make the child whole.[169] This is most likely to work if the situation involved flagrant refusal by the school district to follow the IDEA or action that would cause the child pain and suffering.[170]

The Third Circuit, through its awarding of various forms of remedies, protects children to the extent Congress intended. A speech from the Senate floor just prior to the vote on the 1997 amendments to the IDEA sums up the importance of the IDEA: "This bill sends a message to the

161. *See Ridgewood*, 172 F.3d at 248 (explaining plaintiff's burdens).

162. *See id.* at 248-49.

163. *See id.* at 248-49 & n.8.

164. For a detailed discussion of *Ridgewood*, see *supra* notes 114-24 and accompanying text.

165. For a discussion of elements necessary to secure compensatory education as a remedy, see *supra* notes 125-42 and accompanying text.

166. *See* M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) (mandating grant of compensatory education for period equal to time from which school district knew or should have known IEP was inappropriate, minus reasonable time for district to act to correct IEP).

167. *See id.* at 396 (noting that award of compensatory education does not depend on school district's motivation).

168. *See Ridgewood*, 172 F.3d at 253 (noting that although court did not want to award monetary damages, it decided it "must follow [its] decision in *W.B. v. Matula* . . . which held that IDEA claims may be actionable under section 1983.").

169. *See* W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995) (noting that district courts should look to alternative remedies before monetary damages).

170. *Cf. Ridgewood*, 172 F.3d at 252 (indicating greater willingness to grant monetary damages if child proves more than school district's simple failure to provide appropriate education).

country that we care about education, that we care about children, and that we care about families, that we care about the future."[171] Every court should use the IDEA to those ends.

Jean M. Bond

171. 143 CONG. REC. S4,411 (daily ed. May 14, 1997) (quoting statement made by Senator Lott).